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DATE ISSUED: JUNE 1, 2000

CASE NO.: 1999-LHC-2213

OWCP NO.: 07-144522

IN THE MATTER OF

WILFORD NAILER,
Claimant

v.

NEW ORLEANS STEVEDORING CO.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier

APPEARANCES:

William S. Vincent, Jr. Esq.
On behalf of the Claimant

Douglass M. Moragas, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Wilford Nailer (Claimant), against New Orleans Stevedoring Co.,

(Employer) and Signal Mutual Indemnity Assn., Ltd., (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on March 23, 2000, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their positions. Claimant testified and introduced six exhibits, which were admitted into evidence, (CX-1 to CX-6), including excerpts from the record of the U.S. Department of Labor regarding Claimant, Dr. Charles Billing's testimony and records, Touro Infirmary medical records, Carondelet Clinic medical records, and Dr. Nathanael Mullener's psychological report.

Employer introduced nineteen exhibits, which were admitted into evidence, (EX-1 to EX-19), including an LS-202 - Employer's first report of injury dated June 25, 1997; an LS-206 - payment of compensation, of $200.27 weekly, dated July 3, 1997; a Wage Abstract from Waterfront Employers of New Orleans; Dr. A.J. Lombardo's report dated September 20, 1997; Dr. James T. Williams' report; a bone scan completed by Diagnostic Imaging Services on August 18, 1997; an LS-215 - Notice of Claim filed September 16, 1997; an LS-203 - Claim filed September 9, 1997; an LS-207 - Notice of Controversion filed September 22, 1997; Dr. Ivan Weiner's urology report; a Lumbar Myelogram and CT Scan; Nancy T. Favalora's Vocational Rehabilitation Report dated January 20, 2000, along with a December 23, 1999 and a May 7, 1998 report approved by Dr. Billings; an LS-208 - Notice of Final Payment dated July 6, 1998; an LS-207 - Notice of Controversion dated July 6, 1998; an LS-206 - payment of compensation, limited to $24.18 weekly, dated July 6, 1998; Dr. Billings' deposition and records; and, pages 130-31 of Claimant's deposition. In addition, Employer's counsel called Nancy T. Favalora as a witness.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of Claimant's injury/accident was June 22, 1997.

2. Claimant suffered an injury in the course and scope of his employment.

3. An Employer /Employee relationship existed at the time of the accident.

4. Employer was advised of the injury on June 22, 1997.

5. Employer filed a Notice of Controversion on September 22, 1997 and July 13, 1998.

6. An informal conference was held in this matter on April 27, 1999.

7. Claimant's Average Weekly Wage (AWW) at the time of his injury was $250.27.

8. Employer paid Claimant temporary total disability benefits (TTD) from June 25, 1997 to June 22, 1998, at the weekly compensation rate of $200.27 for fifty-two weeks, totaling $10,414.04.

9. Employer paid Claimant partial disability benefits from June 23, 1998 to March 23, 2000, at the weekly compensation rate of $24.18, totaling $1,924.40.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and Extent of Claimant's Disability.

2. Date of Maximum Medical Improvement (MMI).

3. Suitable Alternative Employment (SAE).

4. Claimant's Wage Earning Capacity.

5. Attorney's Fees.

## III. STATEMENT OF THE CASE

### A. Chronology:

Wilford Nailer (Claimant), is a sixty year old male, with a sixth grade education. (Tr. 13, 35-36). Claimant can sign his name, but is basically unable to read or write[1]. Claimant was working as a class A3

1. Claimant was able to recognize and read the word T-H-E, when I asked Claimant to read a sentence from Employer's witness list, during the hearing on the instant matter. (Tr. 53). Moreover, IQ tests administered by Dr. Nathanael Mullener on October 15, 1998, and tests administered by vocational rehabilitation specialist Nancy T. Favalora, on March 24, 1998, indicated Claimant's illiteracy.

longshoreman out of the Longshore Local 3000 immediately prior to his injury on June 22, 1997. (Tr. 14). Immediately prior to Claimant's injury, his typical longshore job responsibilities included working in ship holds, as a material man, handing another employee material needed to strap containers to the ship's deck. (Tr. 16-17). Claimant's work experience during that time also included selling peanuts on a daily basis, as well as selling soft drinks and fresh vegetables to fellow longshoremen. (Tr. 26). Claimant joined the International Longshoremen Association (ILA) in 1992. Claimant has worked: (1) for the Freighthandlers Union as a freighthandler; (2) at the Burnside Terminal as a longshoreman; (3) for Performance Motors on St. Charles Avenue, a small gas station, where Claimant's duties included writing down the numerical value representing the amount of gas he sold, and giving change; (4) at Brown & Root at the Shell Plant in Norco, driving air trucks and vacuum trucks; (5) for Delta Airlines doing skycapping; (6) for Public Belt Railways doing track repair; (7) labor for Boh Brothers doing construction; (8) for A. Davidson operating a concrete truck, and (9) for an unspecified party operating dozers in Thibodeaux, Louisiana. (EX-13, p.17; Tr. 36, 67).

On June 22, 1997 Claimant was working for Employer, standing on the bottom of a ship deck, handing material to another employee on a ladder, who would use such material to hook a container onto the bottom of the ship. (Tr. 18-20). Claimant was attempting to retrieve a hook for said task, and when he pulled the hook, a jack began rolling, which pushed a pallet board onto Claimant's groin, and Claimant fell back onto the jack. Claimant immediately informed his superintendent of the accident, but continued working. (Tr. 21).

Claimant returned to work the following day, June 23, 1997, when he began urinating blood and was referred, by Employer, to see Dr. A.J. Lombardo, that afternoon. (Tr. 22; EX-11, pp1-2). Dr. Lombardo, with the Carondelet Clinic, examined Claimant, diagnosing him with acute epididymitis/orchitis, and referred Claimant to Dr. Weiner, a urologist, for follow up care. (CX-4).

Dr. Weiner first examined Claimant on June 23, 1997, finding a large right very tender epididymo-orchitis. Urinalysis revealed pyuria and a small amount of blood in the urine. Dr. Weiner prescribed antibiotics, scrotal support, hot tub baths, and told Claimant not to lift anything over twenty pounds. Dr. Weiner saw Claimant again on July 1, 1997, July 10, 1997, July 24, 1997, August 5, 1997, August 19, 1997, September 2, 1997, September 16, 1997, and September, 23, 1997, during which visits Dr. Weiner performed several urinalyses, the results of which were all normal, and treated Claimant for varying degrees of testicle pain and swelling, which was sometimes accompanied by other problems, such as enlarged epididymes accompanied by cysts, slight induration of the upper pole of the right epididymis, an enlarged lymph node in the left groin, pain that extended into Claimant's inner thighs, as well as persistent back pain. Dr. Weiner continued to treat Claimant with scrotal support, hot tub baths, and antibiotics from June 23, 1997, to July 24, 1997, when the antibiotics were discontinued upon Claimant's July 24, 1997 visit to Dr. Weiner, and during which visit an anti-inflammatory drug, Tolectin DS, was added to Claimant's treatment. Moreover, antibiotic treatment was reinitiated upon Claimant's September 2, 1997 visit to Dr. Weiner's office. Claimant last saw Dr. Weiner on October 7, 1997, with the same pain complaints. Upon that visit, Claimant's testicles and urinalysis were normal and Dr. Weiner testified that Claimant was able to return to work. (EX-11).

Dr. James T. Williams, an orthopedist, examined Claimant, upon reference by Dr. Lombardo, on one occasion, August 19, 1997, due to persistent low back pain. (EX-5). Upon that visit to Dr. Williams, Claimant reported constant lower back pain and pain in his left groin, but did not describe any sciatic-type radiation of

pain into either lower extremity. Claimant had noted an intermittent feeling of numbness in his right buttock. Dr. Williams examined Claimant finding him to have a normal range of motion in his lower back. No objective mechanical findings were noted on physical examination of Claimant's lower back. Straight leg raising test were conflicting. However, no clinical evidence of nerve root compression or ruptured intervertebral disc was present. X-ray examination of Claimant's lumbar spine did not reveal any evidence of significant radiographic abnormality. Dr. Williams did not have any recommendations for further orthopaedic treatment at that time. (EX-5).

Claimant next exercised his right, under the Act, to choose a physician and chose to see Dr. Charles Billings for orthopedic treatment. (Tr. 24-25). Dr. Billings first treated Claimant on October 6, 1997, for low back pain during which visit, Dr. Billings performed a physical examination of Claimant. That physical examination produced non-radiating back pain, yet yielded no objective neurological deficit, no objective muscle spasm, full ranges of motion in the hip and knee, with Claimant's gait appearing deliberate with use of a cane for ambulation. All orthopedic spine findings were subjective in nature except x-rays which suggested a spondylolytic defect at L5. (EX-18, pp 7-8). Dr. Billings recommended a Lumbar Myelogram with a CT scan, which was performed on July 8, 1998 at Touro Infirmary (Touro). This test revealed evidence of arthritic type changes primarily at the L4-5 level.

Dr. Billings has continued to treat Claimant on an as needed basis. On his last visit of December 16, 1999, Claimant complained of increased back pain. Dr. Billings' diagnosis was lumbar facet arthrosis, for which Dr. Billings prescribed Darvocet and Vioxx. Dr. Billings related the onset of Claimant's symptoms to the workplace accident he described, with the most likely source of Claimant's discomfort being the small joints in his low back. (EX-18, pp. 31-32). Dr. Billings remained consistent in his recommendation of continued conservative, non-operative treatment, including medications[2] and restrictions, such as no heavy lifting, no prolonged sitting or standing, no repetitive bending or stooping, and no running or jumping. (EX-18, p. 18). Significantly, Dr. Billings recommended that Claimant not return to unrestricted heavy labor activities, as well avoidance of driving if the narcotic, Darvocet, Dr. Billings prescribed made Claimant sleepy. (EX-18, pp. 38, 40). Dr. Billings opined that Claimant's job capabilities would, in large part, be determined by the degree of control of Claimant's symptoms. (EX-18, p. 45).

Claimant returned to the Carondelet Clinic on August 5, 2000 due to severe back pain, his first report of such to the Carondelet Clinic, subsequent to his June 22, 1997 workplace injury. Claimant received physical therapy from the Carondelet Clinic beginning on August 6, 2000 through August 29, 2000, for a total sixteen physical therapy treatments during the month of August 2000. The Carondelet Clinic ordered back x-rays and back scans of Claimant's lumbar spine, which were completed on August 5, 1997 by Diagnostic Imaging

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2. As of the hearing Claimant was taking Darvocet, 100 mg., one tablet every six hours as needed for pain, Propoxy, 100 mg., one tablet every six hours as needed for pain, and Vioxx, 12.5 mg., twice a day, for sleep, all prescribed by Dr. Billings due to injuries Claimant suffered in his workplace accident. (Tr. 32). However, I note that Propoxy is the generic form of Darvocet. Claimant was also using an inhalant, Atrovent, as prescribed by Charity Hospital, which medication is unrelated to Claimant's workplace injury. (Tr. 34-35).

Services, and indicated a transitional disc in the upper sacrum and arteriosclerotic plaques shown in the lower abdominal aorta and iliacs. (CX-4, pp. 2-3).

Claimant has not returned to work as a longshoreman since he first went to the doctor the day following his June 22, 1997 workplace injury, and has not worked for a salary for anyone else since that time. (Tr. 25-26). Following his workplace accident, Claimant continued to sell peanuts about once per week and began receiving Social Security Disability (SSD) benefits.

Claimant met with vocational rehabilitation specialist, Nancy T. Favalora (Favalora), upon Employer's request, on March 24, 1998, to determine job possibilities for Claimant. (Tr. 65-67). Favalora gathered personal background information on Claimant, as well as reviewing Claimant's work history, and medical treatment history related to his workplace injury. In addition, Favalora administered a test to Claimant which indicated that Claimant was unable to perform meaningful reading and writing, but could do addition and subtraction. Favalora also identified the report of Dr. Mullener, who had administered Wechsler IQ tests to Claimant on October 15, 1998, giving Claimant a Full Scale IQ of 59, which placed Claimant in the mild mentally retarded range. (CX-5, pp. 2-3).

Following her initial report of April 14, 1998, Favalora completed a labor market survey and in her May 5, 1998 report identified five full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work. (Tr. 68). Dr. Billings initially approved only two of these positions, but after a subsequent meeting with Favalora on December 21, 1999, Dr. Billings approved two additional positions based on the understanding that said positions did not involve repetitive lifting. In December 1999, Favalora identified three additional jobs, which were also full-time positions.

**B. Claimant's Testimony**

Aside from recounting his work history, the facts of his workplace injury, and medical treatment received for said injury, Claimant testified in detail concerning the effects of his workplace accident on his daily activities and capacities, and the consequent pain he endures. (Tr. 27). Of significance is the compounding effect Claimant's limited intellectual capacity has on Claimant's already reduced capacity to work due to physical limitations arising from his workplace injury.

Claimant testified that immediately after his June 22, 1997 workplace accident, his legs were 'dead' and his back hurt upon urinating. (Tr. 21). Claimant testified that he returned to work the following morning, June 23, 1997, but was 'unable to move' and was urinating blood. (Tr. 22). Claimant testified that Employer sent him to the Carondelet Clinic, where Claimant reported to Dr. Lombardo that it felt like pins were sticking him in his 'back behind,' and which pain Dr. Lombardo treated with heat applications to Claimant's back.

Claimant next saw Dr. Williams, upon reference by Dr. Lombardo, on one occasion, August 19, 1997, due to persistent low back pain. (Tr. 24; EX-5). Dr. Williams would not prescribe Claimant medication for his back pain. Claimant felt that Dr. Williams was not helping him. Thus, Claimant chose to see another

orthopedist, Dr. Billings. Dr. Billings prescribed Claimant medication to treat his lower back pain, as well as physical therapy and other diagnostic tests.

Concerning the physical pain arising from his workplace injury, Claimant testified that his back hurt, he felt paralyzed, and it was as if his arms and legs were "dead." (Tr. 27). Claimant testified that he develops knots on his front and left side, around the middle of his hip, from walking. Consequently, the doctor gave Claimant a cane to use when walking. Claimant uses his cane on a regular basis to reduce the painful side effects of walking. (Tr. 28).

Claimant testified that his daily activities are basically limited to sleeping and/orwatching TV while sitting or lying down on a wooden pallet. On occasion he will stoop only to cause sever pain in the back of his legs, buttocks, and the middle of his side. (Tr. 29-30, 42). Prolonged sitting and standing, the equivalent of about a half an hour, also increase low back pain. Claimant can only walk three to five blocks before getting 'charlie horses' and experiencing significant increase pain. Claimant testified that the medications prescribed by Dr. Billings, Darvocet, Propoxy, and Vioxx, ease his pain, but make him sleepy. The amount of Darvocet and/or Propoxy Claimant takes in any one day varies, depending on how much Claimant hurts during the course of any particular day; however, Claimant testified that he generally takes Vioxx twice a day now, in the morning and late afternoon, and which afternoon dose generally puts Claimant to sleep. (Tr. 31-35, 43-44). At the time of Claimant's deposition Claimant testified that he was only taking Vioxx in the evening, at about 6 p.m. (EX-19, p. 30).

Claimant has also attempted to complete home exercises designed to alleviate pain, but does not understand how to perform such exercises. (Tr. 41). Finally, Claimant's wife has applied ointment to Claimant's skin, which Claimant testified made his skin feel cooler, but his skin still burned and he was in constant pain. (Tr. 42).

Claimant testified that he has not worked for a salary for anybody since June 23, 1997, the day following his workplace injury. He sells peanuts about once a week for cash and receives a monthly Social Security Disability check. (Tr. 25-26). Claimant admittedly had not looked into the only two jobs that he was actually given specific information on, which had been identified by Favalora in a labor market survey, because he was hurting and on pain medication, and was doubtful that he could obtain said positions. (Tr. 37-38). Claimant testified that he applied for a job at Walmart stocking material, but did not get the job because he would have had a problem doing the work. (Tr. 49-51). But for the position at Walmart, Claimant has not applied for any other work. Additionally, Claimant is limited to driving his truck, which is an automatic with power steering, for fifteen to thirty minute intervals, due to difficulty sitting for longer periods of time. Thus, longer trips would create a problem, limiting Claimant's capacity to travel, for any purpose, to a maximum of thirty minutes of driving time.

**C. Testimony of Employer and Vocational Rehabilitation Witness, Nancy T. Favalora**

Claimant met with vocational rehabilitation specialist, Favalora, upon Employer's request, on March

24, 1998, to determine job possibilities for Claimant. (Tr. 65-67). Favalora gathered personal background information on Claimant, as well as reviewing Claimant's work history, and medical treatment history related to his workplace injury. In addition, Favalora administered a test to Claimant which indicated that Claimant was unable to perform meaningful reading and writing, but could do addition and subtraction. Favalora also identified the report of Dr. Mullener, who had administered Wechsler IQ tests to Claimant on October 15, 1998, yielding a Verbal I.Q. of 65, a Performance I.Q. of 59, and a Full Scale IQ of 59, which placed Claimant in the mild mentally retarded range. (CX-5, pp. 1-3). Claimant also completed eleven subtests, in which his scaled scores ranged from one to seven, all below the average score of ten on said subtests, with the average score being a 3.73. Dr. Mullener indicated that he thought the testing he administered to Claimant was valid and that Claimant cooperated to his fullest of capabilities, without showing any signs of malingering or deliberately doing poorly on the testing.

Following her initial report of April 14, 1998, Favalora completed a labor market survey, identifying various full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work. (Tr. 68). Said positions were identified in Favalora's May 5, 1998 report as follows: (1) a sorter position at Spectrum Technologies, which paid $5.25 to $5.55 hourly, and required inspecting and sorting small color-coded parts, which is repetitive work, with lifting at approximately five pounds; (2) a sorter position at Hilton Hotel for the evening shift, which required sorting linens out of bins, and which Dr. Billings did not approve; (3) a parking lot cashier position at Central Parking, which paid $5.45 hourly, and which required putting a ticket into a machine, which would tell the employee how long the customer was parked, and the employee would look at a chart to determine how much was owed, and when the customer paid, for which money Claimant is responsible (EX-20, p. 22-23), the employee would enter the value of the currency provided into a machine, which machine would indicate how much change was due; (4) a production worker position at WEMCO, which paid minimum wage, and which required operating a sewing machine, with a lifting maximum of fifteen pounds; and, (5) a machine operator position at Acadian Embroidery, which paid $5.50 hourly to start, and which required loading a loop onto a machine, and using one's foot to operate the machine, with a lifting maximum of twenty pounds, and the occasional need to put a spool of thread on top of the machine, for which task the employee would stand to perform.

Favalora identified three additional full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work. (Tr. 68, 73-74). Said positions were identified in Favalora's December 21, 1999 report as follows: (1) a linen attendant position at the Hyatt, which was specified to involve sitting 70% of the time, and which job Dr. Billings did not approve; (2) a handwork position at Kalencom Corporation, which required Claimant cut threads and complete knots on canvas bags, totes and other items, which is a sedentary position with a lifting maximum of ten pounds, and pays minimum wage to start; and, (3) an assembler with Duralast Company, requiring the employee to sit or stand, as needed, using hand tools, air compressors, and rivet guns to put fan blades into brackets, with lifting not to exceed twenty pounds and wages of about $7.00 to $8.00 per hour. The worker would sometimes have to box the items for shipping and may also put filters into bags and then pass them to someone to pack into boxes. (EX-13, pp. 6, 8).

Moreover, Dr. Billings did not initially approve the production worker and machine operator positions because he was concerned that said jobs may require repetitive lifting. Subsequent to his disapproval, Favalora

explained to Dr. Billings on December 21, 1999, that the lifting was not repetitive, and Dr. Billings approved the positions based on that information. On December 21, 1999, Dr. Billings also approved the handwork position and assembler position contingent on information provided by Favalora that said positions did not involve repetitive lifting.

Furthermore, Favalora testified that she did not actually contact the employers or personalty fill out the job descriptions on any of the six jobs presented by herself as being appropriate for Claimant (EX-20, pp.17-19). Said information was gathered and compiled by another unidentified individual that Favalora works with, and whether that person actually visited said job locations was also unknown by Favalora. Also of noteworthy significance, Favalora testified that if Claimant was in "severe pain, where he had to stay in bed all day and could not function at all, then he probably would have difficulty working any kinds of jobs." (Tr. 91). In short, Favalora felt that Claimant could work all eight of the jobs she presented based on his past transferable skills.

**D. Testimony of Edward J. Ryan**

Edward J. Ryan (Ryan), a vocational rehabilitation counselor and expert with the Social Security Administration since 1974, was deposed on April 7, 2000 by Claimant's counsel, William S. Vincent, Jr., and Employer/Carrier's counsel, Douglass M. Moragas. Also present was Favalora. Ryan is a licensed vocational rehabilitation counselor (LRC) for the State of Louisiana and a certified Vocational Specialist. Ryan acquired his Masters in Industrial/Vocational Education in 1967, from Louisiana State University. Ryan has been self-employed in vocational evaluation and rehabilitation since 1997, and has done work as a vocational expert with the Social Security Administration, Office of Hearings and Appeals since 1974. (CX-7, pp. 5-7).

Ryan interviewed Claimant on January 10, 2000 for an evaluation of Claimant's condition. Prior to that meeting, Ryan reviewed the following information concerning Claimant's medical treatment history in relation to his workplace injury: (1) Dr. Mullener's report dated October 15, 1998; (2) various reports from Dr. Billings and his deposition dated February 24, 2000; (3) the OWCP-5 Dr. Billings completed January 2, 1998; (4) Dr. Weiner's report dated March 11, 1998; (5) and Dr. Williams report dated August 15, 1997; (6) medical reports from the Carondelet Clinic; (7) a Diagnostic Imaging Service, date of exam August 18, 1997; (8) reports from Touro Infirmary; and, Favalora's reports. (CX-7, pp. 8-10).

Subsequent to the hearing before me on the instant matter, Ryan was furnished with the names and addresses of six employers that were identified as jobs that had been presented by Favalora, and approved by Dr. Billings, as suitable jobs for Claimant. Ryan contacted the six employers and testified as follows concerning each position, in relation to Claimant:

(1) A production worker position at WEMCO, which makes ties and paid minimum wage. Ryan spoke with Priscilla Palazzalo, the Employment Coordinator, on March 29, 2000, who identified the position as full-time, eight hours a day, with one fifteen break in the morning and one fifteen break in the

afternoon, and one thirty minute lunch period. The position is for a sewing machine operator, and requires some sewing and pressing. The work is primarily sedentary, but employees can get up and move around a little bit. Employees lift boxes of ties, approximately fifteen to twenty pounds, when a box is completed and has to be moved to their next station. Of primary concern is the need for Claimant to have good dexterity in order to be employed in said position. Ryan testified that Claimant would likely not meet the manual dexterity requirement as reflected in Claimant's low performance score of 59 on the Wechsler I.Q. test, and also Claimant's low scores on the five performance subtests, which ranged from two to four, with a ten being an average score on said subtests. A 59 performance score indicates that Claimant is far below average in performance work, work with your hands. (CX-7, p.53). Ryan also testified that Claimant could not work an eight hour job, based on Dr. Billing's testimony that Claimant could stand and walk a total of three hours a day, and sit a total of three hours a day, a combined total of six hours per day. (CX-7, pp. 11-20).

(2) A machine operator position at Acadian Embroidery, which pay started at $7.00 hourly, with annual increases. Ryan spoke with Dawn Wilkerson in the personnel department on March 30, 2000, who identified the position as full-time, eight hours a day, with one fifteen break in the morning and one fifteen break in the afternoon, and one thirty minute lunch period. The position is for a machine operator job. Claimant must be able to read the purchase orders and instructions that come through, have good eyesight, and be able to operate the machine needles. The job is performed standing, but if it's a slow day, Claimant may have the opportunity to sit down. They were taking applications for future employment, as there was only one machine operator position at Acadian Embroidery, and they have no sedentary positions. Ryan testified that Claimant would likely not meet the minimum level of reading and writing ability that the job requires. Again, Ryan testified that Claimant would not be able to do this job, which required an eight hour day of mostly standing, based on Dr. Billing's testimony that Claimant could stand and walk for only a total of three hours a day. (CX-7, pp. 21-25).

(3) A parking lot cashier position at Central Parking, which paid $5.15 hourly. Ryan spoke with the bookkeeper, Lanice Montgomery (Montgomery), at the 1400 Girord Street location[3]. Montgomery said there are approximately twenty workers there, with only one full-time position out of those twenty positions, and that position had not been vacant in some time. The positions available would be part-time, for five hours a day, five days a week. Said job required putting a ticket into a machine, which would tell the employee how long the customer was parked, and the employee would look at a chart to determine how much was owed, and when the customer paid, the employee would enter the value of the currency provided into a machine, which machine would indicate how much change was due. At the close of the shift, this person would group the tickets according to amount of the ticket. Next, the employee enters the number of tickets in each group, i.e., number of $2.00, $3.00, $4.00 tickets, on a form. Finally, the employee counts the money and puts the total for the day on said form. Montgomery said the employee must be able to count money and make change. Restroom breaks are given during the day. Noteworthy is the fact that whoever takes the money would be responsible for possible shortages, and Ryan opined that an employee who made too many errors would not have a

3. Ryan was actually provided an address at 1400 Poydras Street for Central Parking, but that address did not exist.

job there very long. Ryan would not typically recommend a job such as this for someone with a 59 I.Q., but Claimant told Ryan that he could count money. Ryan was also concerned about the daily balancing; however, Montgomery told Ryan that she is a full-time employee and does all of the bookkeeping and balancing. Thus, Ryan opined that Claimant could fill said part-time position. (CX-7, pp. 25-28).

(4) A sorter position at Spectrum Technologies, with a starting pay of $5.40 hourly. Ryan spoke to Mary Cockran, in the personnel department, who informed Ryan that the position required inspecting and sorting small color-coded parts, which is repetitive work, with minimal lifting. The work is primarily sedentary, but employees can get up and move around somewhat. A high school diploma or GED is required, which would disqualify Claimant for this position, as he has neither. Furthermore, this job would require Claimant to work full-time or overtime, with no breaks and a thirty minute lunch. Again, Ryan testified that Claimant could not work an eight hour job, based on Dr. Billing's testimony that Claimant could stand and walk a total of three hours a day, and sit a total of three hours a day, a combined total of six hours per day. (CX-7, pp. 29-32).

(5) An assembler with Duralast Company, requiring the employee to sit or stand, as needed, putting small screws and parts into envelopes, and sometimes packing fans to be shipped, with lifting from ten to twelve pounds. Ryan was concerned about Claimant's ability to perform said required lifting, based on Dr. Billings indication that Claimant could not even lift five pounds on a regular basis. (CX-7, p64). Ryan spoke to Mr. Mickey Clement, the office manager, who informed Ryan that all jobs are part-time, filled as production demands, but while an employee is working, they work a full day. However, they are slow and thus not hiring at this time. Furthermore this job would require Claimant to work from 8:00 a.m. to 4:30 p.m., with a morning and afternoon break of ten minutes each, and a thirty minute lunch break. Again, Ryan testified that Claimant could not work an eight hour job, based on Dr. Billing's testimony that Claimant could stand and walk a total of three hours a day, and sit a total of three hours a day, a combined total of six hours per day. Additionally, if Claimant were required to use hand tools, air compressors, and rivet guns, as indicated by Favalora, this would probably present difficulty for Claimant, as indicated by his poor performance score on the prior mentioned I.Q. testing. (CX-7, pp. 32-37).

(6) A handwork position at Kalencom Corporation, requiring the employee to complete small pouches and bags, which is a sedentary position with a lifting maximum of ten pounds, and pays minimum wage to start. The employee must maintain minimum output, requiring good manual dexterity, and applicants are given a short test actually doing the job. The position is full-time and pays minimum wage; although, business is slow and right now they are actually laying off people. Considering the amount of manual dexterity required for this position, Ryan would not recommend Claimant for the job. Again, Ryan testified that Claimant could not work an eight hour job, based on Dr. Billing's testimony that Claimant could stand and walk a total of three hours a day, and sit a total of three hours a day, a combined total of six hours per day. (CX-7, pp. 38-42).

Nonetheless, concerning Claimant's ability to work, Ryan testified that if Claimant "has the pain that he says he does, then I think he probably could not hold a job." (CX-7, p. 68).

**E. Testimony of Dr. Billings**

Dr. Billings, an orthopaedic surgeon and Claimant's treating physician, was deposed on February 24, 2000 by Claimant's counsel, William S. Vincent, Jr., and Employer/Carrier's counsel, Douglass M. Moragas. Dr. Billings is board certified by the American Board of Orthopaedic Surgeons, the American Academy of Orthopaedic Surgeons Fellowship, and the American Orthopaedic Foot and Ankle Society, as well as being licensed to practice medicine in Louisiana, Arkansas, and California. Dr. Billings acquired his Doctorate in Medicine in 1973, from University of Arkansas School of Medicine, and is has staff positions and appointments at Touro Infirmary, Memorial Medical Center, and East Jefferson General Hospital. Claimant's counsel referred Claimant to Dr. Billings for treatment, which treatment was authorized by Lamar Burns & Company. (EX-18, pp. 4-7).

Dr. Billings recounted the details of Claimant's workplace accident and prior medical treatment received for injuries arising out of said accident. Dr. Billings first treated Claimant on October 6, 1997 for low back pain, during which visit, Dr. Billings performed a physical examination of Claimant. That physical examination produced non-radiating back pain, but no objective neurological deficit, no objective muscle spasm, full ranges of motion in the hip and knee, with Claimant's gait appearing deliberate and he used a cane for ambulation. In short, all orthopedic spine findings were subjective in nature. (EX-18, pp 7-8). Although, radiographs indicated a suggestion of spondylolytic defect at L5.

Dr. Billings opined that Claimant's back pain was probably related to lumbar strain that followed the workplace accident as Claimant described, and recommended conservative treatment, including physical therapy, and restrictions in claimant's activities. (EX-18, p. 9; CX-2, p. 33). Dr. Billings next saw Claimant on November 20, 1997 for persistent low back pain, with some numbness into his left leg, and recommended continued conservative treatment. Claimant returned to Dr. Billings' office on January 22, 1998, with persistent low back pain, running into his left leg, and interfering with his daily activities. Claimant also reported sexual functional problems, which is a common symptom of lower back injuries, and for which Dr. Billings recommended that Claimant have a urological evaluation[4]. (EX-18, pp. 33-35). Nevertheless, upon that January 22, 1998 visit with Dr. Billings, all orthopedic spine findings were subjective in nature. (EX-18, p. 10). Dr. Billings testified that a lumbar strain would have lasted three to four months, with a six month maximum, and upon that examination Claimant was six months post workplace injury.

Between January and July of 1998, Dr. Billings treated Claimant on March 26, 1998 and June 4, 1998,

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4. Said recommendation for a urological evaluation was recently made by Dr. Billings on September 16, 1999. According to Claimant's deposition and Claimant's counsel's records said urological evaluation was never approved by Carrier. (EX-18, pp. 33-35). Subsequently, in the hearing before on the instant matter, Employer/Carrier approved a urology evaluation for Claimant. (Tr. 7-11). Dr. Billings testified that this would be a further diagnostic test that may provide him with some insight as to the seriousness of Claimant's low back injury.

during which visits Claimant's symptoms and complaints remained consistent. (EX-18, pp. 11-16). Following Claimant's June 4, 1998 exam, Dr. Billings noted that Claimant had been unable to receive physical therapy or further diagnostic studies as previously suggested by Dr. Billings, and Dr. Billings reordered physical therapy at that time. (CX-2, p. 30).

Subsequently, on June 25, 1998 Dr. Billings again ordered physical therapy, and as well ordered a Lumbar Myelogram with a CT scan, which was performed on July 8, 1998 at Touro Infirmary (Touro). (CX-2, p. 32; CX-3). The radiology report indicated: (1) no evidence of disc herniation, spinal stenosis or focal intradural abnormality; (2) minor degree of right sided facet arthropathy at L4-L5 level without evidence of foraminal encroachment of the spinal canal; and, (3) a transitional segment demonstrated at the lumbosacral junction labeled S1 with a diminutive S1-S2 intervertebral disc. (CX-3, pp. 4-5). Dr. Billings opined that said arthritic changes preexisted Claimant's June 22, 1997 injury, but that said injury exacerbated the arthritic changes in Claimant's back.

Dr. Billings examined Claimant again on August 28, 1998 for follow up regarding persistent low back pain. (CX-2, p.5). Subsequently, on August 29, 1998, Dr. Billings reordered physical therapy for Claimant[5]. (CX-2, p. 31). Dr. Billings remained consistent in his recommendation of continued conservative, non-operative treatment, including medications and restrictions including no heavy lifting, no prolonged sitting or standing, no repetitive bending or stooping, and no running or jumping. (EX-18, p. 18). Dr. Billings had previously completed an OWCP-5 form on January 2, 1998, indicating such restrictions, and testified in his deposition that Claimant should remain restricted as such if Claimant's subjective complaints continued.

Dr. Billings examined claimant again on December 1, 1998 for follow up regarding persistent low back pain, with the orthopaedic impression remaining that of chronic lumbar strain with lumbar disc and joint disease. Claimant was examined again by Dr. Billings on April 6, 1999, September 16, 1999, and December 16, 1999 for persistent low back pain with the orthopaedic impression of lumbar facet arthropathy.

Dr. Billings opined that Claimant's pain related to nerve irritation that is probably related to the exacerbation of the wear and tear changes in the small joints in the low back. (EX-18, p. 14). Claimant's symptoms of heaviness and radiating leg pain are consistent with nerve root irritation, but not nerve root compression or pressure. Additionally, diagnostic studies would have been useful in disclosing nerve root compression or distortion, but not nerve irritation. In sum, Dr. Billings testified that he would continue to restrict Claimant's activities based on his subjective complaints and supported by the diagnostic studies. (EX-18, p. 15).

Concerning jobs identified as being suitable for Claimant in the labor market survey completed by Favalora, Dr. Billings testified that he approved the sorter position and parking lot cashier position as identified by Favalora in a May 7, 1998 letter to Dr. Billings requesting that he review certain job descriptions. (EX-18, pp. 19-24, 38-40). In addition, Favalora held a rehabilitation conference on December 21, 1999 with Dr.

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5. Said recommendation for physical therapy was approved by Employer/Carrier in the hearing before on the instant matter, thus becoming a non-issue, and as such, I will not address therapy. (Tr. 7-11).

Billings, during which Dr. Billings approved two additional positions identified by Favalora, which he had originally disapproved. Said approval was based on information Favalora provided to Dr. Billings the activities required by both positions did not involve repetitive lifting.

Dr. Billings testified that Claimant reached Maximum Medical Improvement (MMI) one year after his workplace injury, which would be June 23, 1998. (EX-18, pp. 25-26). Based on the MRI, the CT Myelogram and Claimant's continued pain, Dr. Billings determined that Claimant suffered from an anatomical physical impairment of approximately five percent of the lumbar spine, which would be about three percent of the whole body. Dr. Billings filled out several reports documenting Claimant's condition as a result of his workplace accident. Dr. Billings completed a physician's statements on January 21, 1998, February 9, 1998, March 27, 1998, April 24, 1998, June 5, 1998, June 24, 1998, July 27, 1998, August 31, 1998, September 24, 1998, October 29, 1998, January 7, 1999, January 29, 1999, in which he described Claimant as suffering from post-traumatic lumbar disc disease, and indicated that Claimant would be limited to clerical/administrative, sedentary, activities. (CX-2, pp. 15-25).

Dr. Billings' prognosis for Claimant was that even with complete resolution of his symptoms, Claimant may not be able to return to his previous unrestricted labor activity. (EX-18, pp. 27-29). Dr. Billings testified that other non-operative treatment modalities for Claimant could include facet joint injections and an active exercise program. Dr. Billings has prescribed Claimant a variety of medications, including pain relievers, muscle relaxants and nonsteroidal, anti-inflammatory medicines, which have provided minimal relief. In fact, medical management of back pain such as Claimant's is frequently of limited use. Dr. Billings testified that when small joints in the back are placed under continuous load, such as standing, sitting, walking, or even remaining upright, the joints can become inflamed and be sources of pain, just as knee joints can hurt from walking, despite known medical treatment. (EX-18, p. 30). Dr. Billings would expect Claimant's symptomatic arthritic condition to be of a chronic nature, which would probably remain consistent and may slowly get worse with further passage of time due to Claimant's increasing age. (EX-18, p. 37).

In sum, Dr. Billings related the onset of Claimant's symptoms to the workplace accident Claimant described, with the most likely source of the discomfort being the small joints in the low back. (EX-18, pp. 31-32). Dr. Billing's view on restricting Claimant's activities has remained consistent, as was reflected in the OWCP-5 that Dr. Billings completed on January 2, 1998, which restrictions generally consisted of walking or standing for up to one hour at a stretch, followed by about a ten minute break, prior to resuming said activity, for up to three hours total walking and standing in one day intermittent, with an additional three hours total sitting in one day intermittent. Additionally, Dr. Billings limited Claimant's lifting to ten to twenty pounds on an occasional basis, suggesting that Claimant not engage in repetitive lifting regardless of the amount lifted. Dr. Billings recommended that Claimant not return to unrestricted heavy labor activities, as well Claimant should be restricted from driving if the narcotic, Darvocet, Dr. Billings prescribed makes Claimant sleepy. (EX-18, pp. 38, 40). Dr. Billings opined that Claimant's job capabilities would, in large part, be determined by the degree of control of Claimant's symptoms. (EX-18, p. 45).

**F. Testimony of Dr. Weiner**

Dr. Weiner first examined Claimant on June 23, 1997, the day following Claimant's workplace accident, and found a large right very tender epididymo-orchitis. Urinalysis revealed pyuria and a small amount of blood in the urine. Dr. Weiner prescribed antibiotics, scrotal support, hot tub baths, and told Claimant not to lift anything over twenty pounds. Dr. Weiner treated Claimant again on July 1, 1997, during which visit a urinalysis was completed, the results of which were normal. Examination revealed Claimant's right testicle and epididymis to be about half the size of the prior week. Claimant was continued on antibiotics and hot tub baths. (EX-11). Dr. Weiner treated Claimant next on July 10, 1997 for continued complaints of pain, but with less swelling. Dr. Weiner continued the same course of therapy he had initially prescribed for Claimant. Dr. Weiner treated Claimant again on July 24, 1997 due to Claimant's continued complaints of pain. However, the urinalysis was normal and the right testicle was almost normal to palpitation. Upon that visit, Claimant reported that the right testicle was still tender and complained of right sacroiliac pain, thus Dr. Weiner discontinued Claimant's antibiotics and prescribed Tolectin DS, an anti-inflammatory drug.

Dr. Weiner next saw Claimant on August 5, 1997. Claimant complained of continued pain in the right testicle, which extended down both inner thighs. Although, the urinalysis was negative and both testicles felt normal. At that time, Dr. Weiner ordered a testicular ultrasound and referred Claimant back to Dr. Lombardo for his back pain. The testicular ultrasound showed both epididymes to be slightly enlarged and both had cysts. Dr. Weiner saw Claimant again on August 19, 1997, with continued pain complaints, but both testicles felt normal and the urinalysis was negative. Dr. Weiner continued Claimant's anti-inflammatory medication.

Dr. Weiner next saw Claimant on September 2, 1997, with continued pain complaints in his right side. Dr. Weiner found slight induration of the upper pole of the right epididymis, and Claimant had a small palpable lymph node in his left groin. Claimant was continued on scrotal support, anti-inflammatory medication, hot baths, and placed on a new antibiotic. Dr. Weiner saw Claimant again on September 16, 1997, who continued with low back pain and pain in his right testicle, reporting that he was unable to achieve erections. The enlarged lymph node in Claimant's left groin was no longer palpable and his right testicle felt normal, with a small upper pole epididymal cyst on the right side. The urinalysis was normal and rectal exam showed a normal prostate. Dr. Weiner saw Claimant again on September, 23, 1997, with continued complaints of back pain, for which Claimant reported that he was going to see Dr. Billings. Claimant's testicles were normal, as was his urinalysis. Claimant last saw Dr. Weiner on October 7, 1997, with the same pain complaints. Upon that visit, Claimant's testicles and urinalysis were normal, and Dr. Weiner testified that Claimant was able to return to work. (EX-11).

**G. Testimony of Dr. Williams**

Dr. James T. Williams, an orthopedist, examined Claimant, upon reference by Dr. Lombardo, on one occasion, August 19, 1997, due to persistent low back pain. (EX-5). Dr. Williams recounted the medical treatment Claimant received subsequent to his June 22, 1997, workplace accident and prior to Claimant's

August 19, 1997, examination by Dr. Williams, and reviewed his medical findings concerning Claimant, in a letter dated August 25, 1997 to Lamorte Burns Insurance Agency.

Upon that visit to Dr. Williams, Claimant reported constant lower back pain, which was made worse by certain activities, such as bending. Claimant said that he avoided lifting due to said pain. Furthermore, Claimant complained of pain in his left groin but did not describe any sciatic-type radiation of pain into either lower extremity. Claimant had noted an intermittent feeling of numbness in his right buttock. Dr. Williams' review of Claimant's physical history, prior to his workplace injury, revealed no previous difficulty with his lower back.

Dr. Williams examined Claimant finding him to have a normal range of motion in his lower back. No objective mechanical findings were noted on physical examination of Claimant's lower back. Straight leg raising test were conflicting. However, no clinical evidence of nerve root compression or ruptured intervertebral disc was present. X-ray examination of Claimant's lumbar spine did not reveal any evidence of significant radiographic abnormality. Dr. Williams did not have any recommendations for further orthopaedic treatment at that time. (EX-5).

## IV. DISCUSSION

### A. Contentions of the Parties

Claimant asserted that (1) he is permanently and totally disabled as a result of his June 22, 1997 workplace accident; (2) his date of MMI was June 22, 1998, as determined by Dr. Billings; (3) Employer did not offer suitable alternative employment through the labor market survey completed by vocational rehabilitation specialist, Favalora, as the labor market survey did not take into consideration all of Claimant's physical limitations due to his workplace accident; and, (4) Claimant's counsel, having been successful in getting Claimant additional benefits, is entitled to a reasonable attorney's fee and reimbursement of expenses.

Employer asserted that: (1) Claimant's testimony is not credible; (2) Claimant is not permanently and totally disabled; (3) Claimant's date of MMI was June 22, 1998, as determined by Dr. Billings; (4) Employer offered suitable alternative employmenthrough the labor market survey completed by vocational rehabilitation specialist, Favalora; and, (5) vocational rehabilitation specialist, Ryan's testimony is not credible.

### B. Credibility of Witnesses

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers

Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc., and Hartford Accident & Indemnity Co., v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d), and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993); Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994).

**1. Claimant's Credibility**

Employer attacked Claimant's credibility stating that their reason for discrediting Claimant's truthfulness was that Claimant's testimony at the hearing concerning his June 22, 1997 workplace injury, varied from what Claimant originally reported. (Tr. 16-22). Employer argued that Claimant contended at the hearing that he had back pains from the onset of his injury, which was contradicted by the evidence. However, I note that Claimant, in fact, indicated that he had pain in the back of his behind at the onset of injury, which is consistent with the record. (Tr. 22).

Employer argued that Claimant further undermined his credibility via his testimony about the medication he takes for his workplace injury, alleging that Claimant was apparently coached to testify that he takes medications early in the morning in order to perhaps add an additional element of an inability to perform certain types of jobs because of medication. First, I find that this argument in and of itself lacks credibility when taking into consideration Claimant's diagnosis of mild mental retardation, and probable inability to be coached due to significant intellectual limitations. I note that Claimant did increase, over time, the amount of medication he normally takes to alleviate pain, which dosage has always remained within the amount prescribed by Dr. Billings. (Tr. 31-35, 43-46; EX-19, p. 30). Neither party presented any further evidence to the record concerning this matter. Taking the entire circumstances into consideration, this is not a basis to discredit Claimant's testimony.

**2. Ryan's Credibility**

Employer attacked Ryan's credibility stating their reason for discrediting Ryan's truthfulness was that Ryan testified that he was out of town on the day of the hearing before me on the instant matter, but was seen that same day at a Social Security hearing. Ryan was, in fact, admittedly out of town, but returned the day in question for a prior scheduled Social Security hearing, which happened to be the same day of the hearing

before me on the instant matter. (CX-7, pp. 43-47). I do not find this to be a contradiction in testimony nor does it indicate a lack of veracity on Ryan's behalf.

Employer next argued that Ryan's interview with Claimant was cursory, he performed no testing of Claimant, and did nothing to attempt to find a job for Claimant. (CX-7, p. 8). However, I note that Ryan's stated purpose was to investigate the six jobs approved by Dr. Billings and presented by Favalora, and evaluate Claimant's capacity to perform said jobs, based on all of the medical evidence in the record, as well as Claimant's I.Q. of 59, all of which I find to have been successfully completed by Ryan.

Concerning Ryan's meeting with Claimant on one occasion, Employer's vocational expert, Favalora, also met with Claimant on one occasion prior to her assessment of Clamant's capabilities. The duration of either meeting was not in the record presented to me by either party, which duration I find to be an unnecessary factor for me to determine the credibility of said expert testimony. In short, Ryan's expert testimony was based on Ryan's personal contact with the six applicable Employers, which personal knowledge I find to be an indication of the truthfulness of Ryan's testimony. Employer has presented no credible basis upon which to discredit Ryan's testimony. In fact, the record presented to me indicates Ryan's credibility as an expert in the field of vocational rehabilitation

**C. Prima Facie Case, Causation, Nature and Extent of Disability, and Suitable Alternative Employment**

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Behlehem Steel Corp., 16 BRBS 128 (1984); Kelaita, *supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); Kier, *supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); Holmes, *supra*; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

In this case, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment on June 22, 1997, and that Claimant suffered a work related injury because of said accident. Furthermore, Dr. Billings related the onset of Claimant's symptoms to Claimant's workplace accident. (CX-6, pp. 16, 26-27, 30-31). Consequently, I find that Claimant is entitled to rely on the presumption supplied by Section 20(a) of the Act. However, this presumption does not establish entitlement to either compensation or benefits under the Act until Claimant establishes the nature and extent of his disability.

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT) (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view toward improving his condition, Leech v. Service Engineering Co., 15 BRBS 18 (1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446 (1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

I find that, in the instant case, Claimant reached MMI by June 22, 1998, as specifically indicated by both Employer's counsel and Claimant's counsel in their respective post-hearing briefs, and as determined by Dr. Billings. (CX-6, p. 25). Thus, although this was presented by both parties as an issue for me to resolve, I accept the mutually consistent opinions of Employer's counsel and Claimant's counsel, based on Dr. Billings medical expertise, that Claimant reached MMI one year post-accident, on June 22,1998[6].

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6. After acknowledging Dr. Billing's expert opinion that Claimant reached MMI on June 22,1998, Claimant's counsel then proceeded to argue, in Claimant's post-hearing brief, that Claimant had not yet reached MMI because Dr. Billings ordered a urological exam. Claimant's

Furthermore, the Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

Claimant established his prima facie case of total disability through Dr. Billing's medical testimony and the restrictions placed on Claimant limiting him to a less strenuous position than his previous job. (CX-6, pp. 18-19). Thus, in the instant case, I have relied on Dr. Billing's position that Claimant suffered from an exacerbation of a pre-existing condition, and restrictions were placed upon Claimant limiting his work were due to said aggravation. Thus, shifting the burden to Employer to prove that they provided Claimant with SAE.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing,

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counsel erroneously asserted that Employer had not authorized any such treatment, when in fact said requested urological exam was approved and physician(s) were agreed upon during the hearing before me. (Tr. 7-11). In sum, I accept the expert medical testimony of Dr. Billings, as presented by counsels' for both parties, that Claimant reached MMI on June 22, 1998.

> are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing SAE, the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In the instant case, as noted above, Claimant established his prima facie claim of total disability, shifting the burden to Employer to establish the existence of SAE during that period of disability. Employer failed to meet this burden. An employer offered position does not constitute suitable employment if is found to be too physically demanding for Claimant to perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984).

Claimant met with Favalora, a vocational rehabilitation specialist, upon Employer's request, on March 24, 1998, to determine job possibilities for Claimant. (Tr. 65-67). Following her initial report of April 14, 1998, Favalora completed a labor market survey identifying five full-time positions, of sedentary and light work, at eight hours per day, that she opined Claimant could perform. (EX-13, p. 6, 8, 10). Said positions had starting wages between minimum wage and about $5.50 per hour. Of these five positions, four were approved by Dr. Billings.

Favalora identified three additional full-time positions that she opined Claimant could perform, using the skills and abilities he had acquired from past work. (Tr. 68, 73-74). Said positions were identified in Favalora's December 21, 1999 report. Said positions had starting wages between minimum wage and about $7.00 to $8.00 an hour. Of these three positions, one was approved by Dr. Billings.

However, the record indicated to me that Favalora's labor market survey did not take into consideration limitations placed on Claimant's capacity to work by Dr. Billings, as well as Claimant's significant cognitive limitations, as indicated by tests administered not only by herself, but also Dr. Mullener's I.Q. testing of Claimant. In fact, Favalora testified that Claimant "has exhibited at least

average aptitudes in general learning indicating the ability to learn new job tasks," which is in clear opposition to the fact that Claimant's general aptitudes fall well within the classification of mild mental retardation. (EX-13, p. 11; CX-5, p. 3). Additionally, all positions identified were full-time positions and did not address Dr. Billing's restrictions placed on Claimant's activities, which restrictions generally consisted of walking or standing for up to one hour at a stretch, followed by about a ten minute break, prior to resuming said activity, for up to three hours total walking and standing in one day intermittent, with an additional three hours total sitting in one day intermittent. (EX-18, pp. 31-32).

Claimant also met with Ryan, a vocational rehabilitation specialist, on January 10, 2000, for an evaluation of Claimant's condition and Claimant's ability, or lack thereof, to perform the six positions presented by Favalora as being within Claimant's capacities. Prior to that meeting, Ryan reviewed Claimant's medical treatment history as provided by Dr. Billings, Dr. Weiner, Dr. Williams, the Carondelet Clinic, Diagnostic Imaging Services, and Touro Infirmary, in relation to Claimant's workplace injury. Ryan also reviewed Dr Mullener's report dated October 15, 1998 and subsequent to the hearing, Ryan was furnished with the names and addresses of the six employers that were identified as jobs that had been presented by Favalora, and approved by Dr. Billings, as suitable jobs for Claimant. Ryan personally contacted the six employers and testified concerning each position. (CX-7, pp. 8-10). Ryan testified that five of the six positions presented by Favalora and approved by Dr. Billings were not SAE for Claimant. The only position Ryan would consider as appropriate for Claimant was the parking lot attendant position. Although Ryan would not typically recommend a parking lot attendant position, in which the employee is responsible for money collected, for someone with a 59 I.Q., Claimant told Ryan that he could count money, thus Ryan identified the part-time, parking lot attendant position as being within Claimant's capacities. (CX-7, pp. 25-28).

Nonetheless, Ryan testified that if Claimant "has the pain that he says he does, then I think he probably could not hold a job." (CX-7, p. 68). Even Favalora testified that if Claimant was in "severe pain, where he had to stay in bed all day and could not function at all, then he probably would have difficulty working any kinds of jobs." (Tr. 91). Moreover, Dr. Billings testified that he would continue to restrict Claimant's activities, as prior restricted in the OWCP-5, based on Claimant's subjective complaints and supported by the diagnostic studies. (EX-18, p. 15). Concerning the six jobs presented on behalf of Employer, by Favalora, as SAE, Dr. Billings opined that the jobs met said restrictions and would be appropriate for Claimant, *if* Claimant's symptoms were under reasonable control and there was no medical contradiction to Claimant attempting such activities. (CX-6, p.24, 45). Dr. Billings admitted that medical management of back pain such as Claimant's is frequently of limited use, and medication had not provided Claimant with much relief, further opining that Claimant's pain has stayed fairly constant at a high level. (CX-6, pp. 28-29, 36).

In addition, the Board has consistently held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case for Section 20(a) invocation. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, the judge may properly rely on the claimant's statements to establish that he experienced a work-

related harm, and where it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in the case.

Furthermore, pain is a concept which can be disabling, and not just to make a prima facie case. A claimant's credible testimony alone, without objective medical evidence, on the issue ofthe existence of disability may constitute a sufficient basis for an award of compensation. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454 (1978); Eller & Co. v. Golden, 620 F.2d 71,12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. Id. at 945, 81.

I credit Claimant's subjective complaints of pain , which are supported by diagnostic studies, as well as the testimony of orthopedic expert, Dr. Billings, and find that Employer failed in its burden to prove that they provided Claimant with SAE. (EX-18, p. 15). Thus, Claimant is entitled to temporary total disability from the date of his injury to June 22, 1998, and to permanent total disability thereafter or from June 23, 1998, the date of MMI, to the present and continuing.

## V. INTEREST AND ATTORNEY FEES

Although not specifically authorized in the Act, the Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*, Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board has concluded that the rate used should be "the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." Grant v. Portland Stevedoring Co., et al.,16 BRBS 267 (1984). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provides for approval of attorneys' fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees. A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

1. Employer shall Claimant compensation for temporary total disability pursuant to Section 8(b) of the Act for the period from June 22, 1997 to June 22, 1998 based on a stipulated average weekly wage of $250.27 at minimum weekly compensation rate of $200.27.

2. Employer shall pay Claimant compensation for permanent total disability from June 23, 1998 at a minimum weekly compensation rate of $200.27 to present and continuing in accordance with the provisions of Section 8(a) of the Act.

3. Employer shall be entitled to a credit of $10,414.04 for temporary total disability benefits already paid to Claimant from June 25, 1997 to June 22, 1998 at a weekly compensation rate of $200.27. Employer is also entitled to a credit of $1,924.40 for permanent partial benefits already paid to Claimant from June 23, 1998 to March 23, 2000, at the weekly compensation rate of $ 24.18.

4. Employer shall pay interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent, as determined by the Secretary of the Treasury, of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel, who shall have twenty (20) days to file any objection thereto.

**ORDERED** this 1st day of June, 2000, at Metairie, Louisiana.

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CLEMENT J. KENNINGTON
Administrative Law Judge